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IN THE

Supreme Court of the United States

October Term, 1972
No. 72-284

NORTH CAROLINA STATE PORTS AUTHORITY,

Petitioner,

-against-

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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ARGUMENT

POINT I

THE QUESTION PRESENTED FOR REVIEW AS TO WHETHER THE NORTH CAROLINA STATE PORTS AUTHORITY (AUTHORITY) IS A CARRIER WITHIN THE INTENT OF AND SUBJECT TO THE RAILWAY LABOR ACT (ACT) RAISES NO NEW ISSUE OF IMPORTANCE FOR THIS COURT, NOR WILL ITS DETERMINATION HAVE MORE THAN VERY LIMITED SIGNIFICANCE IN THE ADMINISTRATION OF THE ACT

The Authority, in its Petition, p.7, states:

> "The holding of the Circuit Court strongly implies that all state-owned railroads, no matter how limited their functions, are 'carriers' within the meaning of 45 U.S.C. § 151, First; and thereby, within the jurisdiction of the Board."

The Court of Appeals in reaching its conclusion that the Authority was a carrier subject to the Act, relied upon this Court's decision in California v. Taylor, 353 U.S. 553. This Court therein did not imply, but affirmatively stated, pp.563-564, that:

> "Nothing in the legislative history of the Railway Labor Act indicates that it should be treated differently from the above-mentioned railway statutes, insofar as its applicability to a state-owned railroad is concerned. Congress

apparently did not discuss the applicability of the Railway Labor Act to a state-owned railroad. This omission is readily explainable in view of the limited operations of publicly owned railroads. We are told by the parties that there are today 30 publicly owned railroads, all of which are switching or terminal roads, and only 11 of which are operated directly by the public. The fact that Congress chose to phrase the coverage of the Act in all-embracing terms indicates that state railroads were included within it. In fact, the consistent congressional pattern in railway legislation which preceded the Railway Labor Act was to employ all-inclusive language of coverage with no suggestion that state-owned railroads were not included." (emphasis supplied)

It is very clear from the foregoing quotation that not only are state-owned railroads subject to the Act but that there are only a limited number which are operated by the public.

However, we do not argue that merely because a state operates locomotives and maintains tracks, it thus becomes subject to the Act. The nature of the operation, bringing it within the definition of a "carrier" under the Act, determines its

status. Thus the National Mediation Board (N.M.B.) which has been clothed with the duty to investigate representation disputes involving carriers by Section 2, Ninth of the Act, 45 U.S.C. 152, Ninth, reached a determination that the Authority was a carrier on the basis of its findings, after a hearing, as follows:

> "It is undisputed that the North Carolina State Ports Authority, an agency of the State of North Carolina, owns and operates port facilities at Wilmington and Morehead City, North Carolina, and that a terminal railroad is operated at each of these locations as an integral part of such operations. The Ports Authority maintains approximately six miles of track in Wilmington, North Carolina, and three miles at Morehead City, North Carolina. Although neither of these railroad facilities appear to be certified by the Interstate Commerce Division [sic] as an interstate carrier, it is undisputed that the operations of the terminal railroad include the movement of freight to and from freight cars owned by interstate carriers, the switching of railroad cars and the storage of freight moved in interstate and foreign commerce. Title 45, U.S.C.A., Section 151, First, by its terms expressly covers companies

'under common control', with any carrier by railroad. Recent decisions of the Federal Courts clearly establish that state-owned railroads have a protected right to bargain collectively with their employer. (California v. Taylor, 353 U.S. 553, 1 L.ed 2d 1034, 77 S.Ct. 1037)."

The Court of Appeals, however, did not rely solely on the Board's findings, but found (A-6)*:

"Plainly the Authority is a link in interstate and foreign carriage of shipments controlled by ship and railway companies."

The Court went on to say that if the meaning of the term "carrier" was one of law, it included facilities as provided by the Authority and if the meaning was one of fact, there was substantial support in the evidence for the Board's finding.

* Refers to Appendix to the Petition

POINT II

THE INTERSTATE COMMERCE COMMISSION (I.C.C.) HAS A VERY LIMITED FUNCTION IN THE DETERMINATION OF "CARRIER" STATUS UNDER THE ACT.

The Act, Section 1, First, 45 U.S.C. § 151, First, provides as follows:

> "First. The term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such 'carrier': Provided, however, That the term 'carrier' shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of trans-

portation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term 'carrier' shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to a carrier where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities."

It is plain from the foregoing that the only function of the I.C.C. is to determine, when called upon, whether a particular railroad operated by electricity is a street, interurban or suburban electric railway excluded from coverage under the Act. The Act confers no other authority upon the I.C.C. in the determination of "carrier" status. Thus the fact that the I.C.C. has not held the Authority to be a "carrier" does not and cannot mean that it is not a "carrier" subject to the Act.

The Authority (p.8) argues further that the I.C.C. does not consider activities such as engaged in by it to be the activities of a "carrier". Were the argument accurate, it would not be determinative of the status of the Authority as a "carrier" under the Act. However, the case relied upon by the Authority, United States v. American S. & T. Plate Co., 301 U.S. 402, merely holds that a spotting service within the confines of an industrial plant (placing railroad cars on the plant's trucks) was not a part of the service of transportation which a carrier is obliged to perform.

We respectfully submit that such a spotting service is totally unrelated to the activities of the Authority, which includes (as found by the N.M.B., see p.4 supra):

(a) the movement of freight to and from freight cars owned by interstate carriers;

(b) the switching of railroad cars;

(c) the storage of freight moved in interstate commerce, and also includes as set forth in the Stipulation of Facts (A-7 to A-12);

(d) handling 9,000 rail cars per annum for which there is included by the line-haul carriers in their tariffs, at least in part, an amount for handling, loading and unloading services;

(e) the loading of freight onto railroad cars;

(f) the unloading of freight from railroad cars.

The foregoing activities clearly bring the Authority within the definition of a "carrier" under the Act, as found both as a fact by the N.M.B. and as a matter of law by the Court of Appeals.

POINT III

THE STATE OF NORTH CAROLINA, IN ITS ENACTMENT OF THE STATUTE CREATING THE AUTHORITY, HAS RECOGNIZED THAT ITS ACTIVITIES WOULD SUBJECT IT TO THE PROVISIONS OF THE ACT AND MADE PROVISION FOR SUCH COVERAGE.

North Carolina Statute § 143-223 provides as follows:

> "The Authority shall have the power and authority to acquire, own, lease, locate, install, construct, equip, hold, maintain, control and operate at harbors and seaports a line of terminal railroads with necessary sidings, turnouts, spurs, branches, switches, yard tracks, bridges, trestles, and causeways and in connection therewith or appurtenant thereto shall have the further right to lease, install, construct, acquire, own, maintain, control and use any and every kind or character of motive power and conveyances or appliances necessary or proper to carry passengers, goods, wares, and merchandise over, along or upon the track of such railroad or other conveyances. And the Authority shall have the right and authority to make agreements as to scale of wages, seniority, and working conditions with locomotive engineers, locomotive firemen, switchmen and switch engine foremen

and hostlers engaged in the operation of the terminal railroads provided for in this section, and the service and equipment pertinent thereto. And should the said Department exercise the authority herein given, then in such event it shall be the duty of the said Department to make such agreements with said employees hereinabove specified, in accordance with the act of Congress known as the Railroad Labor Act (U.S.C. Title 45, sections 151-163) as amended or as hereafter amended to the end that the same agreements as to seniority and working conditions will obtain as to said employees and the standard rate of pay be provided, as are in force relative to like employees of interstate railroads operating in the same territory with terminal railroads authorized hereby. The Authority shall have the right and authority with its terminal railroads to connect with or cross any other railroad upon payment of just compensation and to receive, deliver to and transport the freight, passengers, and cars of common carrier railroads as though it were an ordinary common carrier. (1945, c.1097, s.8.)" (emphasis supplied)

Since North Carolina recognized its obligations under the Act, the statement in the Authority's petition, p.8, that:

"This holding will discourage all States in their attempts to provide rail services for their citizens when such services will clearly not generate revenue and, therefore, have not been provided by private enterprise"

must be taken with a grain of salt. North Carolina was not discouraged from providing the rail services which brings it within the jurisdiction of the Act.

POINT IV

THERE IS NO INCONSISTENCY BETWEEN THE DECISION BELOW AND ANY CASES DECIDED BY THIS COURT AS TO THE PROPER INTERPRETATION OF THE ACT.

The Authority, p.9, attempts to relate the decision of this Court in Edwards v. Pacific Fruit Co., 390 U.S. 538, to the instant case to establish a conflict with the lower Court's decision.

That case involved an action by an injured employee against his employer for damages under the Federal Employers' Liability Act, 45 U.S.C. § 51. It did not involve the Railway Labor Act. The company was in the business of renting refrigerator cars to railroads or shippers. It also serviced the cars.

This Court found that refrigerator car companies are not included within the terms of that Act. However, the Court noted (p.542-543) that though Congress has substantially amended the Federal Employers' Liability Act, it refused to broaden the meaning of railroads to bring refrigerator car companies within its scope. The Court (pp.541-542) also deemed significant:

"* * * The fact that in the years immediately preceeding the 1939 amendment to the Federal Employers' Liability Act, Congress had enacted other major labor and social transportation legislation in which refrigerator car companies were expressly included. For example in the decade of the 1930's Congress passed the following acts which specifically extend coverage to 'any company . . . which operates any equipment or facilities or performs any service . . . in connection with . . . refrigeration or icing. . . of property transported by railroad . . . ' ":

(1) "An amendment of the Railway Labor Act 48 Stat. 1185 (1934), 45 U.S.C. § 151. The Act, as originally passed, 44 Stat. 577 (1926), did not specifically include refrigerator car companies. Congress amended it to do so. * * * "

Therefore, the finding in the Edwards case supports the position of N.M.B. that the Authority is a "carrier" within the meaning of the Railway Labor Act, the Court recognizing that the definition of "carrier" in the Railway Labor Act is much broader in scope than the definition of "carrier" under the Federal Employers' Liability Act.

The other cases cited by the Authority (p.10) are not inconsistent with the decision of the Court of Appeals herein, but rather lend support to both that decision and the determination of the N.M.B.

The factors in United States v. Brooklyn Eastern District Terminal, 249 U.S. 296, are in many ways analogous to the factors contained in the Stipulation of Facts (A-7 to A-12). The question before the Supreme Court was whether a navigation corporation was subject to the Hours of Service Act, as being a common carrier.

The following are some of the factors involved in the Terminal's operations (pp.300-303):

(a) The tracks of the Terminal had an aggregate length of 8 1/2 miles. (p.302)

(b) The Terminal did not hold itself out as a common carrier; nor did it file tariffs with the Interstate Commerce Commission. (p.302)

(c) The Terminal owned or hired no cars itself except locomotive hauling cars. (p.303)

(d) The Terminal, in connection with the movement of cars, employed eight switching crews during the day and two at night consisting of a conductor, engineer, and

two or more trackmen. (p.303)

The Supreme Court concluded that the Terminal was, in fact, a common carrier stating, pps.305-306:

> "* * * The fact that the railroad of the Terminal is short does not prevent it from being a common carrier (United States v. Sioux City Stock Yards Co. 162 Fed. 556); nor does the fact that the thing which it undertakes to carry is contained only in cars furnished by the railroad companies with which it has contracts. Railroads whose only service is hauling cars for other carriers have been held liable as common carriers under the Safety Appliance Acts (citations omitted) and under the Twenty-Eight Hour Law (citations omitted)." (emphasis supplied)

Unquestionably the services performed by the Authority are services on behalf of other carriers.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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